No. 12309

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

CALIFORNIA ASSOCIATED PRODUCTS CO., a corporation, doing business as YANKEE DOODLE ROOT BEER BOTTLING COMPANY,

Bankrupt.

WIL-RUD CORPORATION,

Appellant,

vs.

E. A. LYNCH, *et al.*,

Appellees.

APPELLANT'S REPLY BRIEF.

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Preliminary Statement.

Two briefs have been filed by appellees—one by the Receiver—the other by certain Creditors. In reply, appellant will treat both briefs together, except where separate replies are deemed necessary.

We submit, that appellees have been unable, and noticeably have failed, to answer or refute appellant's contentions, arguments and authorities presented in the opening brief.[1]

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[1]O. B. will refer to Appellant's Opening Brief; R. B. will refer to Receiver's Brief; C. B. will refer to Creditors' Brief. Appellee, E. A. Lynch, will be referred to as Receiver and Appellee Creditors will be referred to as Creditors.

We find no reply to appellant's contention that it was error for the District Court to determine on the merits the controversies between Receiver and appellant. There is no denial that approval of a compromise by the Referee is discretionary, yet appellees have shown no abuse of discretion by the Referee, without which it was error for the District Court to reverse the Referee. The District Judge's findings have not been sustained by competent evidence; they are sought to be supported by counsel's arguments, not evidence. Appellees' own arguments and authorities affirmatively establish that the 25,807 wooden cases involved were not sold "free and clear of any liens, charges and incumbrances." Under appellees' contention Receiver had no title or interest in the cases to sell, and sold only a *burden or charge imposed thereon, i. e.,* the right to repurchase said cases, when and as required by customers, by repaying to them the 60 cents per case deposit, previously deposited with Debtor and Receiver. Certainly this did not constitute a sale of the cases "free and clear" nor compliance with the provisions of the Order Confirming Sale in respect thereto. Appellees make no reference to, or comments upon the representations admittedly made by Receiver prior to the sale, nor to the provisions of the Order Confirming Sale by which delivery and payment are made concurrent conditions. They have confused the issue regarding Receiver's failure to comply with the Order Confirming Sale with claims of "collateral attack" and *"caveat emptor."* These and other matters will receive further comment herein.

We also deem it appropriate to make certain observations concerning Receiver's brief. It indeed presents a strange anomaly. On the one hand we have a Receiver who prepared and filed a petition to compromise controversies, alleging under oath that such compromise is for the best interests of the estate; who appeared before the Referee and sought the approval thereof, presenting evi-

dence in support of the compromise; who prepared findings and an Order approving the same; and who appeared before the District Judge seeking to uphold and support the Referee's order. On the other hand we have this same Receiver appearing before this Honorable Court, and taking a position diametrically opposed to that urged by him in the Court below; who now strenuously opposes the compromise, and challenges appellant's position herein; who joins his late adversaries and blatantly cries that appellant is "chiselling" when he well knows that appellant is entitled to certain equities and performance by Receiver of the Order Confirming Sale. Such Dr. Jekell and Mr. Hyde tactics are without parallel in judicial history or procedure. If Receiver did not desire the compromise, as an officer of the Court he should not have misled appellant and the Referee in seeking its approval. He was made an appellee because we believe he is a necessary party to the appeal. This does not give him the right to reverse the position taken by him in the Court below. So zealous and adversary has the Receiver become that he seeks a dismissal of the appeal, relying upon authorities held no longer applicable by this Court, and fails to cite a case, wherein one of counsel for Receiver participated, decided by this Court and directly opposed to the contention now urged by Receiver.

Comment on Appellees' Statement of Facts.

We respectfully submit that the true facts are presented in Appellant's Opening Brief, supported by record references, which, we urge, should be accepted by the Honorable Court. No attempt will be made to repeat the same, except where clarity demands. Appellees make much ado about the words "as of October 15, 1947, at 5:00 o'clock p. m." contained in the Order Confirming Sale. This, they argue, shows that the sale was on an "as is, where is" basis. Such contention finds no support in the record.

Those words were included to provide the "cut off date" when Receiver's liability for losses, or his right to profits, if any, should cease; the record conclusively shows this. *After* the sale was completed, the following proceedings were had:

> "Mr. Lynch: The bidder will take this business over *as of what date;* and will continue to operate, and what will happen to the profits, if any, that are derived from the operation of this business?
>
> Mr. Gendel: Mr. Katz, do you want it *tonight?*
>
> Mr. Katz: I think we want to get the order." [R. 70; see also R. 93, 105, 106.]

The foregoing conclusively indicated that Receiver was concerned about profits or losses occurring between the sale and confirmation; hence, the "cut off date" was agreed upon. The "tonight" referred to meant 5:00 o'clock p. m., October 15, 1947, the date of sale.

The Receiver, mindful of the rule that loss occurring between the sale and its confirmation cannot be visited upon the purchaser (*In re Fink,* (6 Cir.) 224 Fed. 92, 93; *Hartford Accident and Indemnity Co. v. Crow,* (6 Cir.) 83 F. 2d 386, 387; 6 Rem. Bkptcy. 41, Sec. 2558), sought protection against loss occurring between October 15, 1947 (date of sale), and the confirmation. The date "as of October 15, 1947, 5:00 o'clock p. m." was agreed upon and inserted in the Order as the "cut off date" with respect to liability for losses and profits, if any, arising from the operation of the business—not with respect to quantitative count. Certainly the Referee so understood the term [R. 93]. Appellees rely strongly upon the attempt by Receiver's attorney to include the "as is" condition *after* the sale was completed and appellant's bid was accepted. This attempted change was rejected by the Referee, who replied to Receiver's counsel as follows:

> "The Referee: I think practically all you have said, and as I understood it thoroughly, is that these

bidders are not buying the accounts receivable and they are not taking over the cash, but that they were getting the lease in, as and when they were getting it." [R. 70.]

In judicial sales the Court (Referee), and not the Receiver, is the *real vendor.* (*In re United Toledo Co.,* (6 Cir.) 152 F. 2d 210; O. B. 69.) Therefore the Referee's remarks, and not those of Receiver's counsel, become material. Besides, the attempted exclusion made by the Receiver's counsel after the sale was completed, and not included in the Order, becomes immaterial. (*American Dirigold Corp. v. Dirigold Metals Corp.,* (6 Cir.) 125 F. 2d 446; O. B. 69.)

At the hearing of November 7, 1947, counsel for Receiver conceded that it was *after* the bidding was completed, that he first attempted to include the "as is" condition [R. 76]. The Order Confirming Sale contained no such provision—on the contrary it included among the assets sold "all inventory" [R. 4]. Furthermore, Receiver's counsel conceded that auction sales made in Court were usually made pursuant to inventory [R. 73]. If the *sale* was made "as is" without any reference to inventory, why did the Receiver *check out the merchandise against the original inventory as it was delivered or offered to appellant?* [R. 85-89.] *Such check was made not once, but twice. Why?* [R. 98-100.] *Why did the Receiver prepare a document entitled "Inventory Shortages at California Associated Products Company, Inc."* [R. 81-83] *which actually disclosed the differences in the items reflected upon the inventory and those delivered to appellant?* [R. 89; O. B. 25.] Would this have been done, or even be necessary if the sale had been made "as is"? Most certainly not. These questions remain unanswered in appellees' briefs. The actions of the Receiver belie his present contentions and conclusively establishes that the

sale was made *pursuant to inventory,* and not "as is." The Referee had the right to consider the acts and conduct of the Receiver in determining the meaning of the Order Confirming Sale.

Actual possession of the assets was not given to appellant until *after* confirmation of sale [R. 46]; not before, as Receiver states. Appellees also contend that appellant's (Rudolph's) testimony was to the effect that the Receiver made no undertakings to make good or adjust shortages (R. B. 27; C. B. 13). The portions of testimony quoted do not correctly reflect this testimony; omitted portions give it a different meaning. Yates, Receiver's agent, testified as follows:

> "A. I told Mr. Rudolph that we had not taken a physical inventory, that Mr. Lynch had been operating the business and the Debtor had been operating the business since July 28, *and naturally there would be adjustments on the merchandise that had been used in connection with the operation of the business."* (Italics ours.) [R. 89.]

Sam Rudolph, following a portion quoted in Receiver's brief, further testified:

> "Q. Who checked the second time? A. It was checked by the Receiver's man twice. They thought there was something wrong and they rechecked it again. Not only that, *but they pointed out it was short and they would make it good.*
>
> Q. Who said that? A. Mr. Yates." (Italics ours.) [R. 100.]

The weight to be accorded this testimony and whether any discrepancy or conflict existed therein was solely the province of the Referee. The District Judge, on Review, could neither weight the testimony, nor resolve any conflicts therein. (See authorities O. B. 65-66; also *In re Cummings,* 84 Fed. Supp. 65, 67; *Grace Bros. v. C. I. R.,* (9 Cir.) 173 F. 2d 170-73.) Besides it was conceded that

auction sales in Court usually were made pursuant to inventory [R. 73] and that allowances were always made for shortages [R. 100]. The Referee undoubtedly was familiar with such practices.

Appellees state that since no formal order was ever signed after the November 7, 1947, hearing, that all matters in regard thereto become immaterial. That no formal order was signed is attributable solely to pending negotiations culminating in the compromise. The proceedings had and the Referee's decision at such hearing were referred to and made a part of the petition to compromise [R. 12-13]; and presented, argued and considered at the compromise hearing. They were included and made a part of the record upon Review and upon this appeal. Such proceedings were properly considered. (*In re Kansas Journal Post Co.,* 144 F. 2d 816.)

Appellees' Brief Ignores the Rule That Approval of a Compromise Is Discretionary—the Decision Upon the Merits of the Controversies Not Being Involved—That Upon Review the Sole Question Is Whether the Referee Has Abused His Discretion, and the District Judge Cannot Determine the Controversies Upon the Merits.

In our Opening Brief we have established the foregoing rules. We have shown that it was error for the District Judge to determine upon the merits of the controversies between receiver and appellant—the subject of the compromise—*upon review from the Referee's Order Approving the Compromise.* Appellees have submitted *no authorities,* which permits a determination upon the merits, either by the Referee, or by the District Judge upon review. Yet they seek to argue the merits of said controversies as though that were the real issue involved. In our reply we adhere to our position taken in the Opening Brief that the controversies cannot be determined upon the merits, upon review, but will demonstrate that even if such issues were involved that the District Judge erred in his determinations, Findings and Order.

ARGUMENT—POINTS AND AUTHORITIES.

I.

The Appeal Was Timely Taken and Cannot Be Dismissed Because (A) the Time for Appeal Commences From the Notice of Entry of the Formal Order or Entry, if No Notice Is Given; and (B) if the Time Commences From the Minute Order, Appellant Also Has Appealed From the Minute Order of December 16, 1948, Within Thirty Days Thereof, and That Appeal Is Pending.

A. The Time for Appeal Runs From Notice of Entry or if Notice Be Not Given, From the Entry of the Formal Order, and Not From the Minute Order.

The formal order of the District Court Granting the Petition for Review and Reversing Order of Referee, was entered and docketed May 26, 1949 [R. 48]. Notice of appeal therefrom was filed June 21, 1949 [R. 49], and within thirty days of the entry. This appeal therefore was timely. (U. S. C. A., Title 11, Sec. 48, subd. (a); Bkptcy. Act, Sec. 25a, quoted in O. B. 6.) Appellees' contention that time for appeal commences with entry of the minute order is no longer open to question. A formal order is now required in the District Court and the time for appeal commences either from notice of entry of such order, or actual entry, if notice be not given.

General Order 37 (11 U. S. C. A. fol. Sec. 53) makes the Federal Rules of Civil Procedure applicable to Bankruptcy proceedings. Rule 52a of the Federal Rules of Civil Procedure provides that "in all actions tried upon the facts without a jury, the Court shall find the facts specially and state separately the conclusions of law thereon, and direct the entry of the appropriate judgment." Rule 58 thereof provides "When the Court directs entry of a judgment . . . the Clerk shall enter judgment

forthwith . . ." Rule 54a thereof provides that the term "judgment" as used in said rules "include . . . any order from which an appeal lies." Rule 79a thereof provides "that the Clerk shall keep a book known as 'civil docket,' and shall enter therein each civil action to which these rules are made applicable." Under the foregoing rules, in determining the Review from the Referee's order approving the compromise it was necessary for the District Judge to make formal findings of fact and state separately his conclusions of law thereon, and to make and direct the entry of a formal order. This order was not entered and docketed until May 26, 1949. Within thirty days thereafter this appeal was filed. It was and is timely taken.

In *Rosenberg v. Heffron,* 131 F. 2d 80, 82, this Honorable Court decided that the Federal Rules of Civil Procedure are applicable to Bankruptcy proceedings; that the time for appeal commenced to run from the notice of entry of the *formal order,* or the entry thereof if no notice is given, *and not from the minute order.* This case is decisive against appellees' contention that the appeal was taken too late. (See also *In re D'Arcy,* 142 F. 2d 313; 8 Rem. Bkptcy. 1950, Supp. 42, Secs. 3775 and 3775.01.)

Neither the minute order, nor the opinion of the Judge, even if couched in mandatory form, constitutes an entry of judgment sufficient to start the time for appeal. (*Rosenberg v. Heffron, supra; In re D'Arcy, supra;* 8 Rem. Bkptcy. 1950 Supp. 42, Secs. 3775 and 3775.01.) An opinion does not constitute a judgment. (*Cory v. Hamilton Nat. Bank,* 31 F. 2d 379, 380.) Where both an informal order and a subsequent formal order covering the same matters had been made, the time for appeal runs from the entry of the formal order. (*Cory v. Hamilton Nat. Bank, supra; In re Federal Coal Co.,* 31 F. 2d 375; *Oliver v. Garlick,* 2 F. 2d 132.) The minute order of

December 16, 1948, on its face shows it is but an informal order referring to the memorandum of opinion directed to be filed [R. 36, 37]. This opinion, of course, is not a judgment. Further the record fails to disclose the entry of said minute order [R. 37].

Appellees' authorities, *Mutual Building and Loan Ass'n v. King,* 83 F. 2d 798, and *In re Interstate Oil Co.,* 63 F. 2d 674, were decided *prior* to the adoption of the Federal Rules of Civil Procedure *and are no longer applicable.* This Court so expressly held in *Rosenberg v. Heffron:*

> "Our decision in Mutual Building & Loan Ass'n v. King, 9 Cir., 83 F. 2d 798, cited by appellees, was prior to the adoption of the Federal Rules of Civil Procedure."

B. Appellant Also Has Appealed From the December 16, 1948, Minute Order Within Thirty Days Thereof, and Such Appeal Is Now Pending.

The *certified* record on appeal discloses the following:

(a) That on January 14, 1949, appellant filed a Notice of Appeal from the minute order of December 16, 1948 [Cert. Tr. on App. 50].

(b) That on January 14, 1949, appellant filed a Bond for Costs on Appeal [Cert. Tr. on App. 52].

(c) That on February 2, 1949, appellant filed a Designation of Record on Appeal [Cert. Tr. on App. 53].

These documents, certified by the Clerk of the District Court, are now before this Court, and are referred to in the Clerk's certificate in the *Printed* Transcript of Record [R. 171, 172]. If necessary, appellant will ask leave to print the same.

The record on appeal herein also is applicable to the appeal from the minute order. It may be considered therewith, if necessary. Rule 73g, Federal Rules of Civil Pro-

cedure, which provides that the record on appeal be filed and docketed within forty days, or within the extended time, not exceeding ninety days from the filing of appeal, applies only to District Courts. No such limitation is placed upon Appellate Courts who may disregard a tardy filing, since the time limitation for filing the record on appeal in the Appellate Court is not jurisdictional. (*Miller v. United States,* 117 F. 2d 256; *National Surety Corp. v. Williams,* 110 F. 2d 873; *Buchs v. Federal Land Bank* (9 Cir.), 146 F. 2d 934.) If it be held that there is no timely appeal from the formal order, we respectfully request this Honorable Court to exercise its discretion and consider the present record in connection with the minute order appeal. We however submit that the appeal from the formal order is timely, and that appellees' contentions are without merit.

II.

Appellant, as Purchaser of Assets Sold in Bankruptcy Proceedings, Became a Party to Those Proceedings and May Appeal From Any Appealable Order Injuriously Affecting His Rights as a Purchaser.

Appellant is not a stranger to these proceedings. It was the purchaser of assets sold by the Referee in Bankruptcy.

It is well established that a purchaser of property sold in a Bankruptcy proceedings becomes a party to those proceedings, subjects himself to the jurisdiction of the Court, and may appeal from any final order injuriously affecting his rights as a purchaser. This rule is so well established that it admits of no doubt.

In the early, but leading case of *Blossom v. Milwaukee & C. R. Co.,* 68 U. S. 655, 1 Wall. 655, 17 L. Ed. 673, 674, the United States Supreme Court announced the foregoing principle which ever since has been followed.

Kneeland v. American L. & T. Co., 136 U. S. 89, 10 S. Ct. 950, 34 L. Ed. 379, following the *Blossom* case, states the rule thusly:

> "It was adjudged in *Blossom v. Milwaukee & C. R. Co.,* 68 U. S. 1 Wall. 655 (17: 673), that a bidder at a marshal's sale makes himself thereby so far a party to the proceedings that for some purposes he has a right of appeal. It was said by *Mr. Justice* Miller, in the opinion of the court, that 'it is certainly true that he cannot appeal from the original decree of foreclosure, nor from any other order or decree of the court made prior to his bid. It, however, seems to be well settled that, after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case, in the course of the subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court and render them liable to its orders; and that they may in like manner acquire rights in regard to the subject matter of the litigation, which the court is bound to protect.' 'A purchaser or bidder at a master's sale in chancery subjects himself *quoad hoc* to the jurisdiction of the court, and can be compelled to perform his agreement specifically. It would seem that he must acquire a corresponding right to appear and claim, at the hands of the court, such relief as the rules of equity proceedings entitle him to.' It follows from this decision that his right of appeal must extend to all matters adjudicated after his bid, *which affect the terms of that bid, or the burdens which he assumes thereby,* and which are not withdrawn from his challenge by the terms of the decree under which he purchases. . . .
>
> ". . . Deducible from these authorities, as applicable to the facts in this case, and supported by sound reasons, are the following propositions: First. A party bidding at a foreclosure sale makes himself thereby a party to the proceedings, and subject to the jurisdiction of the court for all orders necessary

to compel the perfecting of his purchase, *and with a right to be heard on all questions thereafter arising, affecting his bid, which are not foreclosed by the terms of the decree of sale, or are expressly reserved to him by such decree. Secondly. Where not concluded by the terms of the decree any subsequent rulings which determine in what securities, of diverse value, his bid shall be made good, are matters affecting his interests, and in which he has a right to be heard in the trial court, and by appeal in the appellate court.*" (Italics ours.)

Williams v. Morgan, 111 U. S. 684, 28 L. Ed. 559, 565, follows the same rule. In *Harduval v. Mer. & Mech. T & S Bank,* 204 Ala. 187, 86 So. 52, the Supreme Court of Alabama states:

"A purchaser at a judicial sale, that is one whose offer to purchase is accepted by the officer authorized to make the sale, subject to confirmation by the Court in due course, acquires vested rights which are entitled to protection. Thenceforward he is a *quasi* party to the proceedings, is bound by the decree of confirmation or rejection, and subject to the orders of the Court with respect thereto. 16 R. C. L. 113, para. 81; Haralser v. George, 56 Ala. 295. He may, of course, appeal from any final order or decree injuriously affecting his right as purchaser. Glennon v. Mittenight, 86 Ala. 455; 5 So. 772; Blossom v. Milwaukee, etc. R. Co., 1 Wall 655; 17 L. Ed. 673."

In *Turnball v. Mann,* 37 S. E. 286, 289, we find the following rule stated thusly:

"Such purchaser seems to be universally regarded as a party to the suit, and being such is liable to be bound both by the terms of the decree under which he purchased and by the subsequent decree of confirmation . . . *or other orders touching the disposition of the property or the purchaser's liability for the purchase money* . . . The decree complained of was a disposition of the money which Cole owed,

a direction how he should pay it. He could not disobey the order of the court and should be protected when he obeyed."

In *West Coast v. Radio Keith Orpheum Corp.* 70 F. 2d 621, 624, following the *Blossom* case, a purchaser was allowed to appeal. In *Strunk Lane and Jellico Mountain C. & C. Co.,* 64 Fed. Supp. 731, 733, a purchaser in Bankruptcy proceedings was held a party to the action and entitled to petition for review when aggrieved by the Referee's order. (To same effect: *Estate of Bradley,* 168 Cal. 655, 657; *In re Pearsons,* 98 Cal. 603 at 605; 4 Corpus Juris Secundum 381, par. 201; 3 Corpus Juris 652, par. 520; 2 Cal. Jur. 211, par. 53; 2 Rem. Bkptcy. 61, Sec. 3757.)

This Court held that a person, though not a formal party to Receivership proceedings, may appeal from an order injuriously affecting his rights. (*Mitchell v. Lay* (9 Cir.), 48 F. 2d 79.)

Appellant is aggrieved by the Order appealed from. It directly affects the purchase, and appellant's rights as purchaser. It affects both the assets and the purchase price, to appellant's prejudice. The foregoing authorities hold this sufficient. The Order deprives appellant of assets and a credit allowed for undelivered assets. It determines the merits of the controversies between Receiver and appellant, and would be *res adjudicata* in any subsequent proceeding, thereby depriving appellant of its day in Court. To argue that appellant is not aggrieved thereby is shear nonsense. Appellant was a party to, and participated in the hearings below. It was the purchaser at the sale [R. 4]; it appeared at and participated in the November, 1947, hearing [R. 72, *et seq.*] and at the hearing on the petition to compromise [R. 114, *et seq.*]; it was permitted to file a brief on Review [R. 44]. To claim that appellant is a "stranger" belies the record.

Further, appellant can maintain this appeal, because Receiver has refused to appeal from the District Judge's Order materially affecting appellant's rights, and with Receiver now in the camp of his late adversaries, unless appellant is permitted to prosecute this appeal, its rights cannot be protected.

Appellees' authorities are not applicable, or in point. They neither deal with a purchaser, nor with a purchaser's right to appeal. We submit that this appeal has been timely, and properly taken by appellant.

III.

Appellant's Relief Was Not Restricted to Rescission. The Representations of Receiver Entitled Appellant to a Proportionate Abatement of the Purchase Price for the Deficiency of Assets Sold but Not Delivered.

From a reading of Receiver's brief it would appear that first Receiver perpetrates, and now seeks to perpetuate a fraud upon appellant. He argues that appellant's sole remedy for Receiver's fraud was prompt rescission. He forgets that an inventory was presented to appellant by Receiver who represented "that naturally there would be adjustments on the merchandise used in connection with the operation of the business" [R. 89] which induced appellant's purchase; that when the merchandise was checked by Receiver's agent that "they pointed out it was short, and they would make it good" [R. 100]; that negotiations were pending to settle appellant's claims for shortages [R. 13, 14], which excused a prompt rescission, even if appellant had been restricted to that remedy. (*Frankish v. Federal Mortgage Co.,* 30 Cal. App. 2d 700, 709-12; *Eade v. Reich,* 120 Cal. App. 32, 38.) Because of representations by Receiver, appellant was not restricted to rescission. It was entitled to a proportionate abatement, or deduction from the purchase price for the deficiency in the

amount of property delivered. (See authorities O. B. 71.) It could be asserted as a defense to proceedings for the balance of the purchase price, or by other appropriate remedy (*Castleman v. Castleman,* 68 S. E. 34, 67 W. Va. 407; 50 Corpus Juris Secundum 628) and delay would not preclude this relief where no equities intervened. No person's rights can be injuriously affected by proportionate abatement as long as a purchaser retains sufficient of the purchase money out of which such abatement can be made. (*Castleman v. Castleman, supra; Marbury v. Stonestreet,* 1 Md. 147; 50 Corpus Juris Secundum 628; O. B. 71.) Appellees' own case, *Hall v. McGehee,* 37 F. 2d 854, states the very rule asserted by appellant as follows:

> ". . . *On the contrary, he sought its confirmation and paid part of the purchase money, with knowledge of the shortage, after it had been confirmed. Under these circumstances, the utmost he could have asked in equity would have been a proportionate abatement of the purchase money, and this the referee gave him, based on his own estimate of the amount of goods that were short.* (Citing cases.)" (Italics ours.)

Contrary to Receiver's contention the Referee in the foregoing case *allowed* the abatement, but purchaser claimed the allowance insufficient, and the review and appeal followed. The Circuit Court reinstated the *referee's allowance.*

The case of *Marbury v. Stonestreet,* 1 Md. 147, is so appropriate that we quote therefrom at length:

> ". . . In the case of *Hill v. Burkley,* 17 Vez., 401, it is said, 'when a misrepresentation is made as to the quantity, though innocently, the right of the purchaser is to have what the vendor can give, with an abatement out of the purchase money, for so much as the quantity falls short of the representation. That is the rule generally, for although the land is not bought or sold professedly by the acre, the presumption is,

that in fixing the price regard was had by both parties, to the quantity which both supposed the estate to consist of. The demand of the vendor and the offer of the purchaser, are supposed to be influenced in an equal degree, by the quantity which both believe to be the subject of their bargain. Therefore a ratable abatement of price, will probably leave both parties in nearly the same relative situation, in which they would have stood, if the true quantity had been originally known.' This doctrine is recognized, and approved by Judge Story, in 4 *Mason,* 417. *We are aware of no reason why the same principle should not be applied to sales made by a court, whose duty it is to protect those who deal with it in good faith. In such cases, equity is done by making compensation out of the unpaid purchase money.* 2 *Har. and Gill,* 350, 358. It makes no difference whether the party making the statement, knew it to be false or not, provided it be of something forming a material inducement to the purchase, and by which the other party was misled to his injury. 'The gist of the inquiry is, not whether the party making the statement knew it to be false, but whether the stateemnt, made as true, was believed to be true, and therefore, if false, deceived the party to whom it was made.' (6 *Gill and John.,* 58. 1 *Md. Chan. Dec.,* 498. 1 *Story,* 195. . . .

The Court then reviews an argument similar to that advanced by appellees herein, and rejects the same, stating:

". . . And to apply this reasoning to the present case, it may be said, that the inconsistency is more manifest when the vendee, instead of setting aside the sale, only asks that he may not be required to pay for more than he gets.

"In such a case the purchaser does not ask that he may be discharged from complying with his contract. He claims an equity, growing out of a subsisting agreement, that the court with which he has dealt, cannot perform. The authorities say, that *it is his equity to have what the vendor can give, and compensation, by way of deduction, for the deficiency.* . . .

"This seems to have been the practice in cases where the sale had been finally confirmed, but the proceeds not yet audited, and the accounts ratified. . . .

"We have seen that the right to relief in cases like the present, does not depend on a knowledge by the party making a misstatement, of its want of truth. It depends on its being untrue, and on the effect it may have had on the conduct and interests of the other party. The appellant avers, that he made this purchase upon a misrepresentation of the trustee, in which he confided, and by which he was misled to his injury. . . . But the circumstances shew, as we think, that the purchase was made, in a great degree, with reference to the quantity of land, and there is proof of a considerable deficiency, . . ." (Italics ours.)

The case of *In Matter of Salantkias,* 33 F. 2d 200, relied upon by both Receiver and Creditors, is not in point. *No representations* were made by the Receiver or Trustee therein, and the Referee found that *none* were made; the purchaser's testimony disclosed he *did not rely* upon the inventory; the order did not include "all inventory," so of course *"caveat emptor"* applied. That decision (by District Judge) does not hold that rescission is the exclusive remedy. It holds that rescission is *available* to the purchaser. Other authorities cited by appellees likewise are not in point. None of them contained *representation* by Trustee or Receiver. In the instant case representations made were made by Receiver; the Order Confirming Sale included "all inventory"; the Referee expressly found that appellant relied upon the inventory in making its purchase, and had the right to so rely [R. 31, 33]. These factors, not present in authorities cited by appellees, rendering them inapplicable.

IV.

Granting Relief to Appellant, by Way of Compromise, for Receiver's Failure to Perform the Provisions of the Order Confirming Sale Did Not Constitute a Collateral Attack Upon Such Order.

Appellees' claim of collateral attack ignores both the representations made by Receiver, and the terms of the Order Confirming Sale, which makes *payment* and *delivery concurrent conditions* and provides that Receiver sold "all inventory" together with all physical assets of Debtor *wheresoever situated*—"free and clear of any liens, charges and incumbrances" [R. 4-5]. Appellant contended that Receiver did not comply with the Order, but failed to deliver all assets bargained for, and that certain assets were not delivered "free and clear"; that therefore it should pay only for that received, and was entitled to an abatement of the purchase price to the extent that Receiver could not comply with the Order. This was proper (O. B. 71, and authorities under preceding Point). In this situation the following language of *Marbury v. Stonestreet,* 1 Md. 147, is most appropriate:

> ". . . when the vendee, instead of setting aside the sale, only asks that he may not be required to pay for more than he gets.
>
> *"In such a case the purchaser does not ask that he may be discharged from complying with his contract. He claims an equity, growing out of a subsisting agreement, that the court with which he has dealt, cannot perform.* The authorities say, that *it is his equity to have what the vendor can give, and compensation, by way of deduction, for the deficiency."* (Italics ours.)

The Referee has the right to determine if the purchaser has received everything to which it is entitled to under the Order (*In re United Toledo Co.* (6 Cir.), 152 F. 2d 210), and if uncertainty exists in the Order, he can inter-

pret it and such construction must be followed (*In re Camden Rail and Harbor Terminal Corp.,* 120 F. 2d 1008). The direction in an order as to time and manner of payment are controlling (50 C. J. S., par. 306). Here payment and delivery were made concurrent. Receiver's failure to deliver all assets purchased entitled appellant to a proportionate abatement of the purchase price. Such determination is not a collateral attack. It is a direct proceeding to determine whether there has been performance of the Order by Receiver. Appellees' authorities do not involve a similar situation and are inapplicable. Appellees' "collateral attack" theory is untenable.

V.

The Doctrine of Caveat Emptor Is Not Applicable Due to Receiver's Representations and the Express Provisions of the Order Confirming Sale.

In seeking to apply *"caveat emptor,"* appellees ignore important factors, *i. e.,* that the Receiver presented an inventory to appellant's agent before the sale [R. 86-87] and represented that there would be adjustments of merchandise used [R. 89]. Under these circumstances the doctrine does not apply. This rule is succinctly stated by the Supreme Court of California in *Webster v. Howorth,* 8 Cal. 21, 26, as follows:

> ". . . It is said that the maxim *'caveat emptor'* applies to judicial sales, and that the defendant cannot avail himself of the misrepresentations of the plaintiff, as he had access to the records of the county, and might have informed himself upon the subject. Grant that the maxim *caveat emptor* applies to sheriffs' sales, it has never been carried to the extent that such a sale could not be impeached on the ground of fraud or misrepresentation. The maxim only applies thus far, that the purchaser is supposed to know what

> he is buying, and does so at his own risk. But this presumption may be overcome by actual evidence of fraud, *or it may be shown that in fact the party did not know the condition of the thing purchased, and was induced to buy upon the faith of representations made by those who, by their peculiar relations to the subject, were supposed to be thoroughly acquainted with it.* The fact that the defendant might have examined the public records does not alter the case. Before such an examination could have been had, the sale would have been over, and he would have lost the opportunity of the purchase. *If, under these circumstances, he applied to the judgment-creditor for information, and, acting upon that information, was mislead to his prejudice, he should be relieved, and the actual party in interest estopped from claiming an advantage, resulting from his own misrepresentations of facts, whether willfully or ignorantly made."* (Italics ours.) (See also O. B. 68-71.)

Appellees' authorities, and those cited by the District Judge, indicate that there were no *representations* made by the Receiver or Trustee. This renders them inapplicable herein. Besides the Order Confirming Sale included "all inventory" among the assets sold. Its meaning was for the Referee to decide, and his determination is binding (*In re Camden Rail and Harbor Terminal Corp.,* 120 F. 2d 1008; *In re United Toledo Co.,* 152 F. 2d 210).

Our previous discussion concerning Rudolph's testimony is likewise applicable herein. If conflict or discrepancy existed therein, it was solely for the Referee to determine. On Review the District Judge was powerless to do so (O. B. 65, 67). It was error to apply the doctrine of *caveat emptor,* both because it was inapplicable, and because it was not a proper issue to determine on Review.

VI.

Even Where Evidence Is Undisputed, This Does Not Give the District Judge the Right to Reject the Referee's Determination as to Its Weight or as to the Credibility of Witnesses, or to Re-try the Factual Questions Anew, and Reject Such Evidence in Whole or in Part.

Appellees' briefs indicate that all factual questions before the Referee were not without conflict. Whether the sale was "as is" presented a factual question with conflicting versions, not only as to what actually transpired, but also whether such proceedings conflicted with the testimony of witnesses. The Referee's determination thereon was conclusive, both as to weight accorded the evidence, and as to the credibility of witnesses. Whether any discrepancy or conflict existed in the testimony was solely for the Referee to resolve, not for the District Judge (O. B. 65-68; *In re Cummings* (D. C. Cal.), 84 Fed. Supp. 65, 67; *Grace Bros. v. C. I. R.* (9 Cir.), 173 F. 2d 170, 173).

The Referee had his own choice not only as to the conflicting versions, but also could draw his own inferences from the undisputed facts (*In re Cummings* (D. C. Cal.), 84 Fed. Supp. 65, 67). These findings based thereon were conclusive upon the District Judge. Assuming that the evidence was undisputed, this would not permit the District Judge to disregard it for "it is axiomatic that uncontradicted evidence must be followed" (*Grace Bros. v. C. I. R.* (9 Cir.), 173 F. 2d 170, 174; *Powell v. Wunkes* (9 Cir.), 142 F. 2d 4; O. B. 65, 66). The District Judge *on Review rejected* the undisputed evidence and made findings directly contrary thereto, primarily based upon the unsworn statements and contentions of appellees' counsel. This he could not do (*Prentice v. Boteler* (9 Cir.), 141 F. 2d 175). In the cases cited by appellees the Court

accepted the facts as true, or they were *agreed upon* as in *Carr v. Southern Pacific,* 128 F. 2d 764. This permitted the Courts to draw their own conclusions of law therefrom. In the instant case the District Judge did not accept, but rejected, the undisputed evidence, and tried the factual questions *de novo.* He passed upon the weight of the evidence, and the credibility of witnesses. This was error (see O. B. 65-67).

VII.

Even Under Appellees' Theory the 25,807 Cases Were Not Sole "Free and Clear of Any Liens, Charges or Incumbrances."

Appellees state that the transaction between the bankrupt and customers concerning the cases was a "sale and return" but not a lien. This contention places the appellees squarely upon the horn of a dilemma. Either the Receiver had no ownership or interest in the cases to sell and therefore sold nothing to appellant, or else he sold them with a claim, charge or burden thereon, *i. e.,* the obligation to repurchase the cases when and if requested by the customers, by repaying the 60 cent deposit previously given to and received by the bankrupt or Receiver. Certainly the Receiver intended to and did sell the cases "free and clear." Appellees do not contend otherwise. If he did not, then appellant was entitled to an equitable adjustment. Appellees' authorities indicate that the obligation to re-purchase the cases from customers constituted a burden or charge thereon.

A *charge* has been defined as a "lien, incumbrance, *or claim* which is to be satisfied out of a specific thing or person to which it applies" (Bouv. Law Dist.); also as "any burden or exaction; any onerous condition which is laid up or which can be borne or taken by a person or thing . . . and more specifically a burden, duty, obligation or

task laid or imposed upon a person or thing, an obligation directly bearing upon the individual person or thing to be affected" (14 C. J. S. 402). Clearly the term "charge" as used in the Order Confirming Sale comes within these definitions. The only exclusion was a certain conditional sales contract [R. 5].

A sale and return is a sale with an onerous condition subsequent. If appellees' authorities are applicable, then the cases were sold to appellant subject to claims by the customers for the 60 cent deposits when demanded, with the burden, obligation and duty upon appellant to repay the same. It becomes crystal clear that these cases were subject, either to a lien or a charge, as used in the Order Confirming Sale, and they were not delivered to appellant "free and clear" as required. This entitled appellant to a pro-rata abatement of the purchase price (50 C. J. S. 627; 656). We, however, adhere to our contention that these cases were subject to a lien (O. B. 72-75). Whether a deposit constitutes a sale, or a bailment subject to a lien, is a matter of *intent*. In all of appellees' authorities the deposit equalled the value of the property delivered. In the instant proceeding the cost of each case with bottles was approximately $1.80 [R. 143]. Clearly the bankrupt did not intend to sell such case with bottles for any 60 cents. The fact that the word "60 cent deposit" [R. 156] was stamped on the cases would indicate a contrary intent, making the transaction a bailment, with a lien dependent upon possession in favor of the customer for the repayment of the deposit.

We neither deny nor dispute that a Bankruptcy Court may sell property "free and clear." This is not done when the property is in the possession of *adverse claimants,* and not the Receiver (Matter of Orpheum Circuit, 20 Fed. Supp. 101) and particularly, not without notice to the

lien holder (6 Rem. Bkptcy. 92, Sec. 2959; *In re Noel,* 137 Fed. 694). In any event possession of the property so sold must be delivered to the purchaser by the Receiver. This the Receiver, in the instant proceeding, failed to do. Possession of said cases could be obtained by appellant only by repaying the 60 cent deposit either by cash, credit, or exchange. Under the Order Confirming Sale, it was Receiver's obligation to deliver such possession to appellant "free and clear." While these cases remained in possession of the customers they were subject to repayment of the deposit before possession could be obtained. This constituted either a lien, or a charge, irrespective of what appellees may now contend.

In any event such issue was not before the District Judge for determination upon Review from the Order Approving Compromise. All that need to have been considered was that the Receiver would have met serious opposition in obtaining possession of the cases, without first repaying 60 cents to the customers. Appellees' position is untenable.

Conclusion.

We respectfully submit that for the reasons and upon the grounds herein, and in our Opening Brief set forth that the Order of the District Court reversing the Referee's Order Approving Compromise and Denying the same, be reversed with directions to affirm the Referee's Order Approving Compromise, together with appellant's cost of appeal.

Respectfully submitted,

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